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IN THE

Supreme Court of the United States

TERM 1959

No. 230

BETRAND E. MOEBUS,

Petitioner,

against

PAUL TISHMAN CO., INC. and I. B. MILLER CONTRACTING CORP.,

Respondents,

HORN CONSTRUCTION CO.,

Respondent,

PAUL TISHMAN GENERAL CONTRACTOR, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RUTHERFORD P. DAY,
Counsel for Petitioner,
Stonleigh Courts,
Washington 6, D. C.

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HORN CONSTRUCTION CO.,

Respondent,

PAUL TISHMAN GENERAL CONTRACTOR, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue from this Honorable Court to review the judgment of the Court of Appeals of the State of New York in the above-entitled case.

Opinions Below

The decision of the Honorable Justice James C. Crane, who heard this case at Special Term, New York Supreme Court, Kings County, is unreported.

Memorandum decision of the Appellate Division of the Supreme Court, Second Department, as reported in 170 N.Y.S. 2d 611, 5 A. D. 2d 786.

The decision of the Court of Appeals, as reported in 5 N. Y. 2d 945.

Each of these decisions is printed as an appendix to this petition.

Jurisdiction

The judgment sought to be reviewed was entered on April 24, 1959 in the office of the County Clerk of the County of Kings, by the Supreme Court of the State of New York, County of Kings, on an order of the Court of Appeals, dated March 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

The state statutes involved are the New York Civil Practice Act, Secs. 181 and 602, Rule 156 of the Rules of Civil Practice, and Rule 9 of the Rules of Supreme Court, Kings County. These are set out verbatim in The Appendix.

Questions Presented

1. Was the petitioner denied due process of law under the Fourteenth Amendment to the United States Constitution by the action of the Trial Judge in summarily denying the respondents' motion to dismiss before petitioner could set forth details of his efforts and activities in this case?

2. Was the reversal of the Trial Judge's decision by the Appellate Division an abuse of discretion, and in keeping with the facts and the law?

3. Was the order of the Court of Appeals in affirming the Appellate Division's decision in compliance with Sec. 602 of the Civil Practice Act?

Statement of the Case

Petitioner herein, Bertrand E. Moebus, while employed as an inspector for the New York City Housing Authority, sustained an accident on November 14, 1952. He instituted a compensation claim, inasmuch as his accident occurred while he was in the course of his employment (R. 15). On January 20, 1954, petitioner retained counsel, Joseph Dean Edwards, Esq., to investigate the possibility of a third party action.

After investigation it was determined that the petitioner might have a cause of action in negligence, and another based upon the contractual rights of which petitioner claimed to be a beneficiary (R. 15).

In order to determine whether or not the petitioner was a third party beneficiary of the contract between the New York City Housing Authority and the various respondents, a copy of the contract had to be obtained, and the contract could not be obtained by the petitioner until shortly before November 12, 1955. Suit was instituted by giving the summonses to the sheriff for service on November 12, 1955, which summonses were served on November 15, 1955 and November 22, 1955 for the purpose of extending the Statute of Limitations pursuant to Sec. 17 of the Civil Practice Act.

Thereafter issue was joined on March 7, 1956, the delay being occasioned by respondent Horn requesting and receiving extension of time from petitioner to answer. Examinations before trial, were held on June 14, 1956 on behalf of respondent Horn Construction Co., on August 27, 1956 on behalf of respondent Paul Tishman Co., Inc., and on September 12, 1956 on behalf of respondent I. B. Miller Contracting Corp. (R. 15-16).

In the interim, and at the request of John P. Smith, Esq., attorney for respondent Paul Tishman Co., Inc., supple-

mental information was furnished to said attorney, requiring further additional investigation.

Medical treatment in this case was afforded to the petitioner pursuant to the Workmen's Compensation Law, under which law the petitioner had made a claim (R. 16).

On February 1, 1957, petitioner began to assemble the various affidavits required by Rule 9 of the Supreme Court, Kings County, strict compliance with said rule being necessary before the case could be placed on the calendar. Dr. Fontanetta, the petitioner's attending physician, who had treated him pursuant to the provisions of the Workmen's Compensation Law, was contacted, and a report requested of him to set forth the history of the accident, the nature of the injury, the length of treatment and type of treatment rendered, and the prognosis. Not hearing from the doctor, another letter was sent to him on March 7, 1957, and on March 18, 1957 the doctor was telephoned, at which time petitioner was informed by the nurse that the doctor was out of town. On March 20, 1957 the doctor requested that he be furnished with written authorization, and that his fee of $25.00, covering cost of said report, be paid in advance. On March 25, 1957, after the necessary authorization had been obtained, it was sent to the doctor together with the $25.00 fee. The doctor's report was submitted to petitioner on or about April 27, 1957. From this report the doctor's affidavit was prepared by petitioner and forwarded to the doctor, so that it could be properly executed by him and returned to petitioner (R. 16).

Concurrently, information relative to petitioner's lost time, reduced earnings, hospitalization, and medical expenses, was sought from the workmen's compensation carrier and the petitioner's employer, in order to draw up the necessary bill of particulars. Under date of June 7, 1957 the employer finally reported to us the statement of petitioner's lost time. A bill of particulars was drawn and sent to the petitioner for verification on June 28, 1957.

and returned to petitioner's counsel on July 5, 1957, on which date it was served upon the respondents.

In the interim, and on June 27, 1957, petitioner received notice of motion on behalf of the respondents Paul Tishman & Co., Inc., and I. B. Miller Contracting Corp., moving for a dismissal of the complaint for failure on the part of the petitioner to diligently prosecute, and returnable on the 24th day of July, 1957 (R. 11).

On July 12, 1957 the petitioner, having drawn copies of the pleadings, the medical affidavit of Dr. Fontanetta, the affidavit of residence of the petitioner, and having served the required bill of particulars, all in compliance with Rule 9, filed a note of issue with Clerk of the Supreme Court, Kings County, who placed this case on the calendar.

On July 24, 1957, the respondents' motion to dismiss was heard before Mr. Justice Crane at Special Term, Kings County, at which time, after only hearing petitioner's attorney state that the matter had been placed on the calendar and that petitioner had complied with the provisions of Rule 9, the Court, without further argument or discussion, summarily denied the respondents' motion to dismiss.

Respondents then appealed to the Appellate Division, Second Department, and obtained an order reversing the determination of the Special Term and dismissing petitioner's complaint against all respondents (App. E, F).

The petitioner moved the Appellate Division, Second Department, by way of an order to show cause, for reargument, which motion was denied on February 18, 1958. Petitioner thereafter appealed to the Court of Appeals for an order reversing the determination of the Appellate Division, Second Department, and reinstating the judgment of the Special Term, Kings County. This appeal was denied by the Court of Appeals, which unanimously affirmed the decision of the Appellate Division (App. G).

How Issue Raised in State Court

In the New York Court of Appeals petitioner argued in Point III that "It is not due process of law when the evidence of plaintiff's affidavits in explanation of the delay herein are ignored by the Appellate Division." Citing Article I, Section VI of the Constitution of the State of New York and the Fifth Amendment to the Constitution of the United States.

Reasons For Granting the Writ

1. Upon the return day of the motion to dismiss the complaint herein for lack of prosecution, petitioner's attorney had submitted an affidavit which briefly set forth the reasons which occasioned the delay in placing this matter on the calendar. The affidavit did not exhaustively set forth in each and every detail all of the efforts that had been made on petitioner's behalf, but briefly and concisely highlighted the difficulties encountered, with the full expectation that the full record could be disclosed in oral argument. The Trial Court, upon hearing that the case had been placed on the calendar prior to the hearing date of the motion, summarily denied the respondents' motion from the bench with the result that petitioner's counsel was not afforded an opportunity to set out in detail all of the facts and circumstances that his affidavit merely highlighted. While the immediate effect of the Trial Court's action was beneficial to the petitioner, on the appeal to the Appellate Division the record contained the bare affidavit without full explanation for the reasons occasioning the delay. The petitioner herein not only has a cause of action sounding in tort, but also one sounding in contract. As such he has a vested right in the accrued cause of action springing from the contract. (*Harris v. U. S.*, 5 F. Supp. 368.) A vested cause of action is "property" and is protected from arbitrary interference, and he

is guaranteed by the Fourteenth Amendment the preservation of his substantial right to redress by some effective procedure. (*U. S.* v. *Standard Oil of California*, 21 F. Supp. 645, affirmed 107 F. 2d 402, certiorari denied, 60 S. Ct. 469.)

2. There was an abuse of discretion by the Appellate Division in reversing the Trial Court's determination in that the Appellate Division specifically found that "in view of the failure of respondent Moebus to set forth *any facts* showing merit in his action of excusing his delay in the prosecution thereof it was an improvident exercise of discretion by the learned Special Term to have denied the motion." (*Brassner Mfg. Co.* v. *Consolidated Edison Co. of N. Y.*, 1 App. Div. 2d 840; *Fast* v. *Meenan Oil Co.*, 1 App. Div. 2d 889) (Italics supplied).

The order entered by the Appellate Division does not comply with Sec. 602 of the Civil Practice Act in specifying whether it was upon the law or the facts, or both, and therefore, pursuant to Sec. 602, there is a presumption that the questions of fact were not considered by the Appellate Division, and that it must be considered to be on the law. (*People ex rel. 711 Corp.* v. *Chambers et al.*, 302 N. Y. 161.)

The cases relied upon by the Appellate Division, when the record is examined, had absolutely no similarity to the facts in this case. In the *Brassner* case, no excuse at all was offered for delay of two years after the action had been at issue. In the *Fast* case, plaintiff's counsel admitted an intent to endeavor to negotiate a settlement. In instant case, all of petitioner's activities had been directed toward preparation for trial, as evidenced by examination before trial of all parties and obtaining the requisite affidavits in order to comply with Rule 9 of the Rules of the Appellate Division, Second Department.

So far as the Appellate Division decision speaks of failure to set forth any facts, the Court had before it the affi-

davit of Dominic A. Morabito, which the Trial Court read, in opposition to the motion. Said affidavit clearly sets forth, though briefly, diligent activity and a reasonable explanation for the delay that was encountered in placing this matter on the calendar.

3. It is a patent denial of due process under the Fourteenth Amendment when a party, in attempting to comply with the rules of a court, is condemned by the delay that such compliance occasions. It has been held in this state that grave and substantial reasons should be assigned in order to deprive a party of the right to have his day in court. (*Henry* v. *Van Zonneveld*, 102 Misc. Rep. 216, 168 N.Y.S. 621.) No such reasons are assigned in the instant matter, but rather the explanation was ignored and the rule established that unless there is strict compliance with Sec. 181 of the Civil Practice Act and Rule 156 of the Rules of Civil Practice, a party will summarily be denied his day in court.

> "The exercise of 'discretion' does not permit the Court to disregard the substantive principles of law established for protection of litigants, including the principle that judgments and decrees which make findings of fact shall be founded on evidence. (*Cohen* v. *Young*, C.C.A. Mich., 127 F. 2d 721, 726.)"

It is universally held in our jurisprudence that the term "discretion" denotes absence of a hard and fast rule, and the establishment of a clearly defined rule ends discretion. (*The Styria*, 22 S. Ct. 731, 734; 186 U. S. 1; *Rugg* v. *State*, 104 N.Y.S. 2d 633, 636, 278 App. Div. 216; *Timm* v. *Timm*, 26 N.Y.S. 2d 884; *Netzley* v. *Hillstrom*, Cal. App. 265 P. 2d 59; *Cohen* v. *Young*, *supra*; *Kujich* v. *Lillie*, 26 P. 2d 383, 389, 390.)

The determination by the Appellate Division was clearly an abuse of its discretion in that the law was misapplied and the judgment rendered was manifestly unreasonable. The petitioner had submitted evidence of diligent activity

and explanation of the delay. The Court chose to ignore the explanation, but stated that petitioner had not submitted "any facts." This finding was not based upon the evidence, and as such was arbitrary and can find no sanction in law or equity.

In substance, the New York Court of Appeals is upholding the power of the Appellate Division to act arbitrarily in matters of discretion, despite the fact that the Appellate Division has limited its powers to review such questions. In the case of *Rugg* v. *State*, *supra*, the Appellate Division stated, in speaking of its powers to review questions of discretion:

> "Our powers of review comprehend the right to review an exercise of discretion by inferior courts and, equally, the right to exercise our own discretion, independently, when the facts, or the circumstances, of the case are such as to justify it."

The Appellate Division, therefore, cannot be arbitrary in review of questions of discretion, but must look to the facts or circumstances in each case.

The arguments made by the respondents were based on a strict interpretation of Sec. 181 of the Civil Practice Act and Rule 156 of the Rules of Civil Practice, and their affidavits in support of their contentions fail to set forth any facts alleging hardship or prejudice accruing to them by reason of the excusable delay herein. The reasons set forth in the affidavits are, however, not directed toward the discretion of the Court, but rather to the Court's strict interpretation of the sections which call for dismissal of the action where the plaintiff has failed to serve and file a note of issue, and more than six months have elapsed since issue has been joined. The order filed by the Appellate Division reversing the Trial Court's determination on the grounds previously set forth was not in compliance with Sec. 602 of the Civil Practice Act, which requires the Court to specify whether its decision was based upon the law or the facts, or both. The Court of Appeals, therefore,

erred in not reversing and remanding the Appellate Division's order. (*People ex rel. 711 Corp.* v. *Chambers et al., supra.*)

There exists today on the various court calendars in the State of New York, a backlog of cases that in and of themselves prevent the speedy administration of justice. The various courts of the State have outlined rules of procedure designed to limit and restrict the number and types of cases that can properly appear before them. In this case the petitioner sustained serious permanent physical injuries of a degree and nature that would permit him to have his case heard in the Supreme Court. The mere filing of a note of issue is not sufficient to place this type of action on the court calendar. Rule 9 of the Rules of the Appellate Division of the Second Department requires extensive and exhaustive affidavits attesting to the seriousness of the injuries, by physicians, plaintiff's attorney, and the plaintiff himself. This is a time-consuming procedure, and strict compliance is demanded by the Court. Once accomplished, and a note of issue filed, together with the Rule 9 papers, due to the congestion of the calendar the cause will not be heard for at least two more years. Strict compliance, therefore, with Rules 181 of the Civil Practice Act and 156 of the Rules of Civil Practice, would be a denial of due process.

In this case only the petitioner's attorney was burdened with the responsibility and a sense of urgency. Dr. Fontanella, the New York City Housing Authority, and the petitioner's employer had no motivation for haste. Based upon the facts enumerated herein, it cannot be said that the petitioner was lax in the preparation of this case for trial or that he failed to offer a reasonable explanation for the delays encountered.

It is therefore respectfully submitted that the petition should be granted.

Rutherford P. Day,
Counsel for the Petitioner.

APPENDIX A

Section 181 of the Civil Practice Act

181 Dismissal of Complaint for Neglect to Proceed.

Where the plaintiff unreasonably neglects to proceed in the action against the defendant, or one or more defendants against whom a separate judgment may be taken, the court, in its discretion, upon the application of the defendant or defendants or any of them against whom he so neglects to proceed, may dismiss the complaint as against the moving party or parties and render judgment accordingly.

APPENDIX B

Rule 156 of the Rules of Civil Practice

Rule 156. Motion for Dismissal of Complaint.

Whenever an issue of fact in any action pending in any court has been first joined and (1) the plaintiff therein shall fail to serve and file a note of issue for a term within six months thereafter; or (2) if the plaintiff therein shall have failed to serve and file a note of issue at a time when later cases have been reached in regular order on the calendar of a term for which a note of issue could have been served and filed, the defendant at any time after the expiration of either such event may move for the dismissal of the complaint, with costs for the failure on the part of the plaintiff to diligently prosecute such action.

If it be made to appear to the court on the hearing of such motion that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court may permit the plaintiff, on such terms as may be just, to bring the said action to trial at a future term; otherwise the complaint shall be dismissed.

APPENDIX C

Section 602 of the Civil Practice Act

602. Order of Appellate Division to Specify Grounds Upon Reversal or Modification; Presumption Otherwise Made.

Whenever the appellate division reverses or modifies or sets aside a determination and thereupon renders a final or interlocutory judgment or order, except where it reinstates a verdict, its order shall state whether its determination is upon the law, or upon the facts, or upon the law and the facts.

1. If the determination is stated to be upon the law alone, the order shall also state whether or not the findings of fact below have been affirmed; and

2. If the determination is stated to be upon the facts, or upon the law and the facts, the order shall also

(a) specify the findings of fact which are reversed or modified, and

(b) set forth any new findings of fact made by the *appellate division with such particularity as was em*ployed for the statement of the findings of fact in the court of original instance; except that

(c) the order need not specify the findings of fact which are reversed or modified nor set forth any new findings of fact if the appeal is either from a determination duly rendered by the court without any statement of the findings of fact or from a judgment entered upon a general verdict without special findings.

If the order of the appellate division does not comply with the requirements of this section, the court of appeals shall presume that the questions of fact were not considered by the appellate division.

APPENDIX D

Rule 9 of the Supreme Court, Kings County

RULE 9. PREFERENCE IN TRIAL OF ACTIONS TO RECOVER DAMAGES FOR PERSONAL INJURIES RESULTING IN PERMANENT OR PROTRACTED DISABILITY OR TO RECOVER DAMAGES FOR DEATH.

(a) On motion of the justice presiding at Trial Term, Part I, or at any Pre-Trial Term, an action to recover damages for personal injuries resulting in permanent or protracted disability or to recover damages for death, may be advanced to any Ready Day Calendar or otherwise preferred for trial, provided:

(1) That one of the plaintiffs is a resident of the County of Kings; or that plaintiffs are non-residents of the State of New York and the venue of the action was properly laid in the County of Kings; or that the City of New York or its Transit Authority is a party defendant and the action arose in the County of Kings; and

(2) That before or together with the note of issue there shall have been filed with the Trial Term Calendar Clerk; (a) a copy of the summons drawn in conformity with the Rules of Civil Practice (Rule 45); (b) a copy of the verified complaint, of the answer whether verified or unverified and of the verified bill of particulars containing, inter alia, the particulars specified in the Rules of Civil Practice (Rule 116); (c) an affidavit by a doctor (in personal injury actions other than malpractice) describing the claimed injuries, stating the probable duration of such injuries and of the plaintiff's disability by reason thereof, and giving the doctor's prognosis; and (d) proof of service upon the adverse parties of a copy of said bill of particulars and of a copy of a notice to the effect that, within five days after such service or on or before any

other specified future date, plaintiff will file with the Trial Term Calendar Clerk all the requisite papers warranting a preference in the trial of the action under Rule 9 of the Kings County Supreme Court Rules.

(3) Within eight days after the service of said notice, any adverse party may file with the Trial Term Calendar Clerk affidavits and other papers showing why a preference in the trial of the action is not warranted under said Rule 9. (Added June 8, 1953; am. Oct. 5 and Dec. 20, 1955.)

(b) Actions of the character specified in the preceding subdivision, which are now on the calendar, may be similarly advanced for trial, on motion of the justice presiding at Trial Term, Part I, or at any Pre-Trial Term, after hearing counsel for the respective parties and after examining the pleadings and bill of particulars. In actions involving personal injuries, the justice shall also examine the affidavit referred to in the preceding subdivision. Unless already on file, said documents (the pleadings, the bill of particulars and the affidavit) shall be filed with the calendar clerk of Trial Term or with the court before a preference in trial may be granted.

(c) Any action which, prior to January 1, 1953, has been deferred in trial at a Calendar Classification and Control Term, shall be restored to the calendar at end of the deferment period, pursuant to the classification rule (Kings County Supreme Court, Rule 2, subd. bb, subd. 5); and such action shall not be further deferred by reason of any preference in trial which may be granted pursuant to any provision of this rule. (Added June 8, 1953.)

APPENDIX E

Memorandum of Decision by the New York Supreme Court, Appellate Division, Second Department

In an action to recover damages for personal injuries based, inter alia, on a claim of negligence, the appeal is from an order denying appellants' motion to dismiss the complaint, in which respondent Horn Construction Company joins, and to dismiss respondent Horn's cross-complaint against the appellants, for lack of diligent prosecution, and to sever the action as to defendant Paul Tishman General Contractor, Inc. Order reversed, with $10.00 costs and disbursements, and notion granted to the extent of dismissing (1) the complaint as to appellants and respondent Horn Construction Company and (2) dismissing the cross-complaint. In view of the failure of respondent Moebus to set forth any facts showing merit in his action or excusing his delay in the prosecution thereof, it was an improvident exercise of discretion by the learned Special Term to have denied the motion (Brassner Mfg. Co. v. Consol. Edison Co. of N. Y., App. Div., 2d, 840; Fast v. Meenan Oil Co., 1 App Div 2d, 889)

APPENDIX F

Decision by New York Supreme Court, Appellate Division, Second Department, on Motion for Reargument

Moebus, plf-res, v. Paul Tishman Co., Inc., and ano., def-ap (Horn Const. Co., def-res; Paul Tishman General Cont., Inc., def)—Motion referred to the court that rendered the decision. Present: Nolan, P.J.; Murphy, Ughetta, Hallinan and Kleinfeld, JJ. Motion for reargument denied, with $10 costs. Present: Nolan, P.J.; Murphy, Hallinan and Kleinfeld, JJ. Wenzel, J., not voting.

APPENDIX G

Decision of Court of Appeals, State of New York

363 Moebus, ap, v. Paul Tishman Co., Inc., et al., res (Paul Tishman General Contractor, Inc., def)—Appeal dismissed, with costs, upon the ground that the sole question presented involves a non-reviewable exercise of discretion (Quick Service Novelty Corp'n v. Scharf, 4 N. Y. 2d 799; Feingold v. City of N. Y., 4 N. Y. 2d 783). No opinion. All concur.

APPENDIX H

Remittitur

No. 363

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of February in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

WITNESS,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR February 26, 1959.

Appendix H

No. 363.

Bertrand E. Moebus,

Appellant,

vs.

Paul Tishman Co., Inc., & ors.,

Respondents,

and

Paul Tishman General Contractor, Inc.,

Defendant.

BE IT REMEMBERED, That on the 1st. day of December in the year of our Lord one thousand nine hundred and fifty-eight, Betrand E. Moebus, the appellant—in this cause, came here unto the Court of Appeals, by Joseph Dean Edwards, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the second Judicial Department. And Paul Tishman Co., Inc., & ors., the respondents in said cause, afterwards appeared in said Court of Appeals by John P. Smith, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaiad, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John J. Tomich, of counsel for the appellant—, and by Mr. John Nielsen, of counsel for the respondents Paul Tishman Co., Inc. and I. B. Miller Contracting Corp., and by Mr. Richard E. Shandell, of counsel for the respondent Horn Construction Co., and

after due deliberation had thereon, did order and adjudge that the appeal herein be and the same hereby is dismissed, with costs, upon the ground that the sole question presented involves a nonreviewable exercise of discretion (Quick Service Novelty Corp. v. Scharf, 4 N. Y. 2d 799; Feingold v. City of New York, 4 N. Y. 2d 783.)

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said appeal be dismissed, with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON

Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, February 26, 1959

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON
Clerk.

APPENDIX I

Order Entered March 24, 1959 Making Order of Court of Appeals the Order of Supreme Court, County of Kings.

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Joralemon and Fulton Streets, Borough of Brooklyn, City of New York, on the 25 day of March, 1959.

Present: Hon. Milton M. Wecht, Justice.

Bertrand E. Moebus,

Plaintiff,

against

Paul Tishman Co. Inc., Paul Tishman General Contractor, Inc., Horn Construction Co. and I. B. Miller Contracting Corp.,

Defendants.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division, Second Judicial Department, made and entered the 20th day of January, 1958 which (1) reversed an order of the Supreme Court, Kings County, made and entered in the office of the Clerk of the County of Kings on the 6th day of August, 1957, denying the motion of the defendants Paul Tishman Co. Inc., I. B. Miller Contracting Corp. and Horn Construction Co., pursuant to Section 181 of the Civil Practice Act and Rule 156 of the Rules of Civil Practice to dismiss the complaint in the above entitled action because of plaintiff's failure to diligently prosecute said action and (2) granted said motion to the

extent of dismissing the complaint as to the defendants Paul Tishman Co. Inc., I. B. Miller Contracting Corp. and Horn Construction Co. and dismissing the cross-complaint of Horn Construction Co. against defendant I. B. Miller Contracting Corp., and from the judgment entered upon said order of the Appellate Division in the office of the Clerk of Kings County on the 18th day of February, 1958, and said appeal having been duly argued in the Court of Appeals and said Court of Appeals having by order entered in the office of the Clerk of the Court of Appeals dismissed said appeal with costs, upon the ground that the question presented involves a non-reviewable exercise of discretion; and the remittiture, dated the 26th day of February, 1959, having been remitted to this Supreme Court to be enforced according to Law; and upon reading and filing said remittiture from the Court of Appeals; it is, upon motion of John P. Smith, attorney for the deefndants Paul Tishman Co. Inc. and I. B. Miller Contracting Corp.,

ORDERED that the said order of the Court of Appeals be and the same hereby is made the order of this Court.

Enter,

MILTON M. WECHT,
J. S. C.

Granted

March 23, 1959

JOSEPH B. WHITTY,
Clerk.

APPENDIX J

Judgment Filed April 24, 1959

SUPREME COURT : KINGS COUNTY

BERTRAND E. MOEBUS,

Plaintiff,

against

PAUL TISHMAN CO. INC., PAUL TISHMAN GENERAL CONTRACTOR, INC., HORN CONSTRUCTION CO. and I. B. MILLER CONTRACTING CORP.,

Defendants.

Plaintiff's Address:

1878 Stanhope St., Brooklyn, N. Y.

Defendants' Addresses:

Paul Tishman Co. Inc., 21 East 70th Street, New York, N. Y.

Horn Construction Co., 217 Hewlett Avenue, Mayrick, L. I., N. Y.

I. B. Miller Contracting, 18-12 45th St., Astoria, L. I., N. Y.

The above named plaintiff having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court for the Second Judicial Department, made and entered the 20th day of January, 1958, which reversed an order of the Supreme Court, Kings County, and directed that the complaint be dismissed as to the defendants Paul Tishman Co. Inc., I. B. Miller Contracting Corp. and Horn Construction Co. because of plaintiff's failure to diligently prosecute the above entitled action, and from the judgment entered upon said order of the Appellate Division in the office of the Clerk of Kings County on the 18th day of

February, 1958, and the Court of Appeals having dismissed said appeal with costs, and the Remittitur of the Court of Appeals having been remitted to the Supreme Court and an order having been entered in the office of the Clerk of the County of Kings on the 24th day of March, 1959, making the order of the Court of Appeals the order of this Court, and the costs and disbursements of the defendants Paul Tishman Co. Inc. and I. B. Miller Contracting Corp. of said appeal having been taxed at the sum of $121.29 and the costs and disbursements of the defendant Horn Construction Co. having been taxed at the sum of $110.19; it is, on motion of John P. Smith, attorney for the defendants Paul Tishman Co. Inc. and I. B. Miller Contracting Corp.

ADJUDGED that the appeal of the plaintiff be dismissed, with costs; and it is further

ADJUDGED that the defendants Paul Tishman Co. Inc. and I. B. Miller Contracting Corp., do recover from the plaintiff the sum of $121.29, the amount of their costs and disbursements on appeal to the Court of Appeals taxed herein, and that the said defendants have execution therefor, and it is further

ADJUDGED that the defendant Horn Construction Co. do recover from the plaintiff the sum of $110.19, the amount of its costs and disbursements on appeal to the Court of Appeals as taxed herein and that said defendant have execution therefor.

JUDGMENT dated this 24th day of April, 1959.

JOSEPH B. WHITTY,
Clerk.

Filed & Rec.
Time 3 H05 M
April 24, 1959
Kings County Clerk's Office

APPENDIX K

Decision and Order of Trial Court.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Kings, at the courthouse, Joralemon and Fulton Streets, Borough of Brooklyn, City of New York, on the 6th day of August, 1957.

Present: Hon. James C. Crane, Justice.

Bertrand E. Moebus,

Plaintiff,

against

Paul Tishman Co., Inc., Paul Tishman General Contractor, Inc., Horn Construction Co. and I. B. Miller Contracting Corp.,

Defendants.

The defendants Paul Tishman Co., Inc. and I. B. Miller Contracting Corp. having moved this Court for an order dismissing the above entitled action for the plaintiff's failure to diligently prosecute the same, and the motion having duly come on to be heard on the 24th day of July, 1957, and

After reading and filing the affidavit of Thomas O. Perrell, sworn to the 26th day of June, 1957, and the affidavit of Alan W. Craig, sworn to the 23rd day of July, 1957, and the notice of motion dated June 26, 1957, with due proof of service in support of the motion, and the

affidavit of Joseph J. Brophy sworn to the 8th day of July, 1957, in partial support of the motion, and the affidavit of Dominic A. Morabito, sworn to the 22nd day of July, 1957, in opposition thereto, and after hearing Alan W. Craig, of counsel, in support of the motion and Dominic A. Morabito, of counsel, in opposition thereto, and due deliberation having been had thereon,

ORDERED that the motion be denied,

Enter,

J. C. C.,
Acting Supreme Court Justice.

FILE COPY

Office Supreme Court, U.S.
FILED
AUG 19 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 230

BERTRAND E. MOEBUS,

Petitioner,

against

PAUL TISHMAN CO., INC. and I. B. MILLER CONTRACTING CORP.,

Respondents,

HORN CONSTRUCTION CO.,

Respondent,

PAUL TISHMAN GENERAL CONTRACTOR, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT, HORN CONSTRUCTION CO. IN OPPOSITION

HAROLD SHAPIRO,
Counsel for Respondent,
Horn Construction Co.,
355 Lexington Avenue,
New York, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 230

BERTRAND E. MOEBUS,

Petitioner,

against

PAUL TISHMAN CO., INC. and I. B. MILLER CONTRACTING CORP.,

Respondents,

HORN CONSTRUCTION CO.,

Respondent,

PAUL TISHMAN GENERAL CONTRACTOR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT, HORN CONSTRUCTION CO. IN OPPOSITION

Opinions Below

The opinions below are accurately set forth in the Petition.

Jurisdiction

Jurisdiction of this Court is invoked by the petitioner under 28 U.S.C. Sec. 1257(3). It is respectfully submitted that jurisdiction is improperly invoked because the highest State Court, in which a decision could be had in the instant case, is not the Court of Appeals of the State of New York, but the Appellate Division of the Supreme Court.

The judgment of reversal of the Appellate Division of the Supreme Court was entered in the office of the Clerk of Kings County, as required by New York practice, on February 18, 1958, more than ninety days before this petition was filed.

The Court of Appeals of the State of New York dismissed the appeal of petitioner herein for lack of jurisdiction to review a discretionary order of the Supreme Court, Appellate Division. This decision was based upon the limitation of the Court of Appeals to review questions of law (New York Civil Practice Act, Sec. 605). This limitation on the power of the Court of Appeals as applied to decisions such as the one here involved is of long standing and clearly expressed in the decisions of the Court of Appeals.

Mills v. *Davis*, 53 N. Y. 349 (1873);
Reif v. *Rutenberg*, 242 N. Y. 601 (1926);
Mitchell v. *City of Yonkers*, 255 N. Y. 633 (1931);
Trapani v. *Samuels*, 3 N. Y. 2d 931 (1957);
Feingold v. *City of New York*, 4 N. Y. 2d 783 (1958);
Quick Service Novelty Corp. v. *Scharf*, 4 N. Y. 2d 799 (1958).

Accordingly, certiorari should properly be to the Appellate Division of the Supreme Court of the State of New York, Second Department, and the time for petitioner to

petition for a writ of certioari began to run when the judgment of that Court was entered.

Largen v. *Texas*, 318 U. S. 418 (1943);
Parker v. *Illinois*, 333 U. S. 571 (1948).

This is a case in which review is discretionary and must be sought and denied as in *Woods* v. *Miersheiner*, 328 U. S. 214.

Moreover, it is respectfully submitted that jurisdiction is improperly invoked because petitioner herein failed to seasonably raise a constitutional question below. A constitutional question was never properly raised before any State Court. New York procedure requires that, to raise a constitutional question in the Court of Appeals, the question must be raised below.

City of New Rochelle v. *Gloster*, 296 N. Y. 509 (1946);
Rector etc. of the Church of the Holy Trinity v. *Melish*, 301 N. Y. 679 (1950);
Cf. Jongebloed v. *Erie R. Co.*, 296 N. Y. 912 (1942).

The petitioner herein further raised no constitutional objection to the relief demanded by the respondents herein either in the Trial Court, Special Term, or in the Appellate Division, and did not raise it even on the motion for reargument in the Appellate Division. In the Court of Appeals for the first time petitioner in his brief contended that the Appellate Division dismissal for lack of prosecution was violative of the Fifth Amendment of the Constitution of the United States. In extended oral argument, counsel for petitioner did not once raise this or any constitutional question. He seemed indeed to have abandoned the claim because, while the answering briefs pointed out that the Fifth Amendment to the Constitution was not applicable to State actions, no reply or supplemental brief

was ever served nor did petitioner's counsel make any attempt to correct this error. Accordingly, since the constitutional question was never properly raised in the Court below, it cannot be raised here on petition for a writ of certiorari.

Herndon v. *Georgia*, 295 U. S. 441 (1935).

Questions Presented

1. Was the petitioner deprived of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, by the order of the Appellate Division reversing the Trial Court and dismissing petitioner's complaint for failure to diligently prosecute his action?

2. Was the petitioner deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, by the action of the Court of Appeals in dismissing his appeal?

Statement of the Case

The petitioner herein instituted this action, which was one for personal injuries arising out of a construction accident, by service of process in or about November 1955 (fol. 27). Issue was joined by service of defendant's answer in or about March 1956 (fol. 27). Examinations before trial were conducted in August and September 1956 (fol. 46). Thereafter and until February 25, 1957, the plaintiff took no action toward placing this case on the calendar. On February 25, 1957, the plaintiff received a letter from John P. Smith, attorney for the defendants-respondents Paul Tishman Co., Inc. and I. B. Miller Contracting Corp., advising of the imminence of a motion to dismiss for lack of prosecution (fol. 29).

Thereafter the plaintiff delayed four months in filing a note of issue and did not file same until they were in receipt of a motion to dismiss for lack of prosecution (fol. 29). The excuse offered by the plaintiff's attorney in his affidavit in opposition to the motion to dismiss for lack of prosecution was that it took four months following February 1957 to secure information necessary for the preparation of papers to satisfy the requirements of Rule 9 and that he is a very busy practitioner (fol. 47). No excuse was offered for the period between August and September of 1956 and February of 1957.

On June 26, 1957, defendants-respondents, Tishman and Miller, moved to dismiss the instant action for failure to prosecute, in which motion the defendant-respondent, Horn Construction Co., joined. On July 24, 1957, the return date of the motion, Mr. Justice Crane denied the motion to dismiss (fols. 13-17). Defendants-respondents, Tishman and Miller, appealed to the Appellate Division of the Second Department, which Court reversed the decision below and ordered that the complaint herein be dismissed for lack of prosecution (fols. 61-66), following which a judgment, pursuant to said order, was entered (fols. 67-72). In its decision, the Appellate Division pointed out that no affidavit of merits by the plaintiff had been submitted at Special Term and that no excuse for the delay in noticing the case for trial had been offered.

Following the entry of the order, petitioner moved by order to show cause for reargument of the appeal in the Appellate Division, submitting with that motion, for the first time, an affidavit by the plaintiff, petitioner herein, setting forth, in accordance with the established practice in New York, a brief description of the accident, showing that there was some merit to his contentions and a statement to the effect that it was his intention to pursue the action to completion. Also submitted on the motion for reargument was an affidavit by Joseph Dean Edwards, the attorney for the plaintiff, petitioner herein, setting

forth in detail some of the difficulties which he contended had caused the delay in filing a note of issue. The motion for reargument was denied and the plaintiff, petitioner herein, appealed to the Court of Appeals. The Court of Appeals, in an order entered in the office of the Clerk of the Court of Appeals on February 26, 1959, dismissed the appeal on the ground that it involved a non-reviewable exercise of discretion.

ARGUMENT

The Decision Below is Clearly Correct

The Appellate Division did not abuse its discretion in dismissing the complaint of the plaintiff, petitioner herein, for failure to diligently prosecute his action. The respondents herein moved at Special Term on July 24, 1957, pursuant to Section 181 of the Civil Practice Act and Rule 156 of the Rules of Civil Practice, for an order dismissing the complaint for failure on the part of the plaintiff to diligently prosecute. At this time, approximately sixteen months had passed since joinder of issue and ten months since the completion of examinations before trial. Counsel for the plaintiff, petitioner herein, in his affidavit in opposition to said motion, offered as an excuse for this delay only that it took him four months of this time to acquire some information which he needed in order to comply with Rule 9 of the Rules of the Supreme Court, Kings County. No excuse at all was offered for the more than five months delay following completion of examinations before trial prior to receipt of a letter from the attorney for the respondent Paul Tishman Co., Inc. of his intention to move for a dismissal of the complaint unless the case was placed upon the calendar. No affidavit of merits by the plaintiff was submitted. Nevertheless the Trial Judge denied the motion.

The Appellate Division, in the exercise of its discretion as conferred by Section 181 of the Civil Practice Act and

Rule 156 of the Rules of Civil Practice, reversed the order of the Trial Judge and ordered the complaint dismissed on the grounds as indicated in its opinion, that the plaintiff had failed to submit an affidavit of merits and had failed to satisfactorily explain or excuse the delay in noticing the case for trial. In arriving at its decision, the Appellate Division acted within the exercise of its powers to review an exercise of discretion by the subordinate division of the Supreme Court and, in doing so, to exercise its own independent discretion.

Pietrarola v. *N.J.H.R.R. & F. Co.*, 197 N. Y. 434 (1910);
Rugg v. *State*, 278 App. Div. 216, 104 N.Y.S. 2d 633 (Third Dept. 1951).

In *Pietrarola* v. *N.J.H.R.R. & F. Co., supra,* the Court said, in referring to the powers of the Appellate Division: "Its powers of discretion comprehend the right to review an exercise of discretion by the inferior Courts and equally the right to exercise its own discretion independently where the facts or circumstances of the case are such as to justify it."

The decision was in accordance with previously indicated standards of the Appellate Division, requiring the showing by the plaintiff that the action is meritorious and the showing by counsel that he has diligently attempted to prosecute the action toward trial. Excuses that the plaintiff's attorney was a busy practitioner or that the file had been misplaced or other similar excuses had never been considered sufficient.

Moshman v. *City of New York*, 3 App. Div. 2d 822, 160 N.Y.S. 2d 977 (First Dept. 1957);
A. R. Hyde & Sons v. *Roller Derby Skate Co.*, 1 App. Div. 2d 942, 150 N.Y.S. 2d 325 (First Dept. 1956).

An affidavit of merits has always been required, e.g.:

O'Rourke v. *City of New York*, 3 App. Div. 2d 713, 159 N.Y.S. 2d 366 (Second Dept. 1957);
Brassner Mfg. Co. v. *Consolidated Edison Co.*, 1 App. Div. 2d 840, 148 N.Y.S. 2d 782 (Second Dept. 1956);
Fast v. *Meenan Oil Co.*, 1 App. Div. 2d 889, 149 N.Y.S. 2d 332 (Second Dept. 1956).

The Appellate Division has properly held that it was an abuse of the Trial Judge's discretion to deny the respondents' motions to dismiss, even though a note of issue had been served following the receipt of a notice of motion. The fact that the Trial Judge, upon hearing that the case had been noticed for trial, regarded this point as conclusive and did not hear further argument, in no way deprived the petitioner of due process. The requirements of statements made under oath, showing both a meritorious action and diligent prosecution, in order to defeat a motion made pursuant to Rule 156, could have in no way been met by further oral argument. In any event, due process does not require oral argument. Long usage has established the practice, particularly in a busy Motion Part, of Judges not hearing full oral argument that counsel may wish to offer and all Courts put time limitations on counsel's oral argument. Counsel knew or should have known what papers were necessary. His failure to prepare them is a mere error on his part and in no way reflects on the procedure of the Courts of the State of New York, which was in accordance with long established practice.

The refusal of the Appellate Division to grant reargument and accept evidence not presented to the Trial Court below, was also proper and in accordance with long established practice.

Clark v. *Stannard*, 286 App. Div. 953, 143 N.Y.S. 2d 96 (Fourth Dept. 1955);

New York Cable Co. v. City of New York, 104 N. Y. 1 (1887);
People ex rel. Dady v. *Supervisor of 31st Ward*, 91 Hun 206, 36 N.Y.S. 348 (Second Dept. 1895).

Moreover, even the affidavits presented by counsel on the motion for reargument in the Appellate Division raised no constitutional question. It is clear that the Courts may, in the interest of speedy litigation, avoiding congestion of the calendar, dismiss stale claims.

Hirsch v. *Goldstein*, 265 Mass. 358.

In view of the fact that even the additional affidavit offered no excuse for the delay of counsel between September of 1956 and January of 1957 and between January of 1957 and July of 1957, and in view of the fact that the additional affidavit set forth between January of 1957 and July of 1957 two or three letters and a telephone call or two in over five months, the Court, in its discretion, need not have found sufficient excuse established.

Petitioner argues that the Appellate Division did not exercise its discretion but rather applied a fixed rule of law. The interplay of rule and discretion is an interesting area of jurisprudence. The mere fact that, with the establishment of precedents, standards are established as guide posts to the exercise of discretion does not mean that a Court has not exercised judgment.

See

Cardozo, Paradox of Legal Science, Chapter 1;
Pound, Justice According to Law, 13 Col. L. Rev. 696 (1913).

No Important Federal Question is Presented

Petitioner herein makes no attack on Rule 156 generally. He claims merely that in a particular case, involving a

particular litigant in a personal injury action, the Court of the State of New York failed to pay proper heed to the excuse of his attorneys for failing to comply with Rule 156 of the Rules of Civil Practice. This claim is made in a case in which these excuses were not fully, or even impliedly, set forth before the Trial Judge. This is a case which at best devolves around its own particular facts of misunderstanding and wherein petitioner had ample notice and a full opportunity to be heard by an impartial tribunal. No question is raised involving the rights of litigants in the State of New York generally.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HAROLD SHAPIRO,
Counsel for Respondent,
Horn Construction Co.

FILE COPY

SUPREME COURT, U.S.
FILED
AUG 20 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

..... TERM, 1959

No. 230

BERTRAND E. MOEBUS,

Petitioner,

against

PAUL TISHMAN CO., INC. and I. B. MILLER CONTRACTING CORP.,

Respondents,

HORN CONSTRUCTION CO.,

Respondent,

PAUL TISHMAN GENERAL CONTRACTOR, INC.,

Respondent.

BRIEF FOR RESPONDENTS PAUL TISHMAN CO., INC. AND I. B. MILLER CONTRACTING CORP. IN OPPOSITION

JOHN P. SMITH,
Attorney for Respondents,
Paul Tishman Co., Inc. and
I. B. Miller Contracting Corp.,
10 Rockefeller Plaza,
New York City.

JOHN NIELSEN,
Of Counsel.

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IN THE

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PAUL TISHMAN GENERAL CONTRACTOR, INC.,

Respondent.

BRIEF FOR RESPONDENTS PAUL TISHMAN CO., INC. AND I. B. MILLER CONTRACTING CORP. IN OPPOSITION

Opinions Below

The memorandum opinion of Special Term, New York Supreme Court, Kings County, is unreported.

The memorandum opinion of the Appellate Division of the New York Supreme Court, Second Judicial Department

(Appendix E, p. 15—Petitioner's Brief) is reported at 5 App. Div. 2d 786. Said Court's memorandum opinion denying the motion for reargument (Appendix F, p. 15—Petitioner's Brief) is reported at 5 App. Div. 2d 867.

The decision of the Court of Appeals of New York (Appendix G, p. 16—Petitioner's Brief) is reported at 5 New York 2d 945.

Jurisdiction

The order of the New York Court of Appeals dismissing petitioner's appeal was entered on February 26th, 1959.

Judgment for costs was entered thereon in the office of the Clerk of Kings County, New York, on April 24, 1959.

The petition for writ of certiorari was served on July 17, 1959.

Petitioner invokes the jurisdiction of this Court under Section 1257(3) of 28 U. S. Code.

Questions Presented

The question here presented is whether this Honorable Court will review a unanimous decision of a New York court exercising its discretion under a New York statute.

Statement of the Case

Petitioner sued for personal injuries alleged to have been sustained as the result of the negligence of respondents.

The alleged accident occurred on November 14, 1952.

Although the respondents Paul Tishman Co., Inc. (hereinafter referred to as Tishman) and I. B. Miller Contracting Corp. (hereinafter referred to as Miller) were available for service, petitioner did nothing with respect to the in-

stitution of his action against Tishman and Miller until two days prior to the expiration of the three year Statute of Limitations when, on November 12, 1955, he delivered the summons to the sheriff for service. The summonses were served on respondents Tishman and Miller on November 15, 1955 and November 22, 1955 respectively (R. 9).

Issue was joined by service of said respondents' answers on March 5, 1956.

Petitioner had not put the case on the calendar as of February 25, 1957, and by letter of that date, petitioner's attorney was advised that unless the action was discontinued or put on the calendar, a motion to dismiss would be made (R. 9).

Petitioner's attorney replied immediately, asking for two or three weeks to collate the necessary information.

When four months more had elapsed, during which time the petitioner did not act to put the case on the calendar, respondents Tishman and Miller, by notice of motion dated June 26, 1957, moved to dismiss the action of the petitioner for failure to prosecute, said motion being returnable July 24, 1957.

Prior to the return date of the motion, petitioner served his note of issue, affidavit of residence, doctor's affidavit and notice (R. 9).

Although it had been repeatedly held in New York by the appellate courts that an affidavit of merits, verified by the party, is necessary in opposition to a motion to dismiss the complaint for failure to prosecute the action, no such affidavit was submitted by petitioner. The only affidavit submitted by petitioner was a pro forma affidavit by an attorney associated with petitioner's atforney (R. 15-16). No additional time was requested to supply such affidavit.

Special Term denied respondents' motion but on appeal, the Appellate Division reversed the order of Special Term

and granted the motion dismissing the complaint on the ground that there was an improvident exercise of discretion as there was no affidavti of merit or excuse for delay in prosecuting the action (Appendix E, p. 15—Petitioner's Brief).

The Court of Appeals of the State of New York dismissed the petitioner's appeal to that Court on the ground that the only question presented involved a non-reviewable exercise of discretion (Appendix G, p. 16—Petitioner's Brief).

POINT I

There are no questions for review by this Honorable Court.

Petitioner presents three questions for review by this Honorable Court (p. 2—Petitioner's Brief).

1.

Petitioner contends, in substance, that Special Term, in ruling in his behalf in denying respondents' motion, denied is attorney the opportunity for oral explanation of material not in the affidavit submitted by the attorney in opposition to respondents' motion and not sworn to by petitioner, and in so doing, denied him due process under the Fourteenth Amendment of the United States Constitution.

In so arguing, petitioner ignores the provisions of Rule 12(f), Special Term Rules, Supreme Court, Kings County (Appendix I—this Brief) that all papers must be submitted to the Court before oral argument and overlooks the fact that oral argument on a motion is not an inherent right.

Obviously, the reason for Rule 12(f) is that the Court cannot, as pointed out by the Court of Appeals on the argument before it, consider as part of the record the unverified statements of counsel on oral argument.

The Court of Appeals made a similar observation with respect to the attempt by petitioner's counsel to include, in an appendix to his brief in the Court of Appeals, papers not submitted to Special Term and not a part of the Record on Appeal before the Court of Appeals. (In this connection it is to be noted that on p. 4 of Petitioner's Brief, he sets forth facts not found in the Record on Appeal.)

The practical basis for this reasonable rule is to regulate practice before the court so that each party may be confronted only by sworn affidavits and not by unsworn statements of material withheld or not included which may surprise one's adversary (see *Life Insurance Co.* v. *Francisco* (1873), 84 U. S. 672, 679).

No constitutional rights of petitioner were denied by Special Term.

2.

Petitioner argues that the Appellate Division abused its discretion.

This Court has held, as did the New York Court of Appeals in this case, that it has no review of matters within the discretion of the courts below, even if it should disagree with the holding of said courts (*Wiggins* v. *Gray*, 65 U. S. 303, 306; *Cheang-Kee* v. *United States*, 70 U. S. 320, 326). Especially is that true where there was, as here, a unanimity of decision by the judges in the court below (*Wiggins* v. *Gray*, 65 U. S. 303, 306).

Plaintiff, who failed to explain why there was a delay of almost three years in commencing his action, a delay of twenty months after joinder of issue, and a delay of four months after his attorney was notified by respondents' counsel that a motion to dismiss the complaint for failure to prosecute would be made, before he placed the case on the calendar, is contending here that five judges of the Appellate Division, in a unanimous decision, abused their

discretion in agreeing that petitioner had failed to present facts excusing his delay and in holding that he failed to comply with the rule that an affidavit of merit be submitted.

As the 8th Circuit aptly stated in *Moffett* v. *Commerce Trust Co.*, 187 Fed. 2d 242, 248-249, cert. den. 342 U. S. 818, this complaint is not uncommon to defeated litigants.

In the case at bar there is merely a failure by five appellate judges to agree with petitioner's interpretation as to what constitutes unreasonable neglect in prosecuting his action.

3.

The substance of petitioner's argument is that the New York Court of Appeals erred in its application of a New York statute, Section 602, Civil Practice Act (Appendix C, p. 12—Petitioner's Brief) to the order of the Appellate Division.

Section 181 of the Civil Practice Act and Rule 156, Rules of Civil Practice (Appendices A and B, p. 11—Petitioner's Brief) specifically provide that the dismissal of the complaint under such section and rule shall be in the discretion of the Court, so there was no erroneous application of Section 602 by the Court of Appeals.

Aside from the merits, however, this Court has held that whether a state statute has been properly construed or applied by the court of last resort of that state is not subject to review by this Court (*Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393).

Matters of procedure are governed by the law of the forum and a decision of the state court on such matters will not be reviewed by this Court (*Tripp* v. *Santa Rosa St. R. R.*, 144 U. S. 126, 130; *Central Vermont R. Co.* v. *White*, 238 U. S. 507; *Market St. Ry. Co.* v. *Railroad Commission of California*, 324 U. S. 548; *Thorington* v. *Montgomery*, 147 U. S. 490, 494).

POINT II

It is submitted that there is no compliance here by petitioner with Rule 19, subd. 1, Rules of the Supreme Court of the United States, since it does not appear that the Court of Appeals of New York State has decided a federal question of substance not heretofore decided by this Court or has decided it in a manner not in accord with the applicable decisions of this Court.

Rather, there is involved only the discretionary decision of a state court in the regulation of the practice in the state courts in accordance with the statutes and rules of practice applying in such courts. Similar provision is found in Rule 41(b), Fed. Rules of Civil Procedure.

Moreover, it cannot be said that a unanimous decision by a five judge bench is an abuse of discretion. The decision is in accordance with New York law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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JOHN NIELSEN,
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Appendix I.

Supreme Court, Kings County

Rule 12, Special Term, Part I.

(a) In Special Term, Part I, there shall be heard all litigated motions or contested motions or applications except those directed by these rules to be heard in other parts. • • •

(f) Unless otherwise directed by the justice presiding, no motion will be heard: (1) Unless the moving papers and all papers in opposition are ready for submission at the time of argument, and (2) unless each party has served on the adverse parties a copy of every affidavit and memorandum to be submitted to the court.